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SPECIFIC PERFORMANCE OF CONTRACTS—DE-
FENCE OF LACK OF MUTUALITY.

Third Paper.

THE AMERICAN CASES ON CONTRACTS CONTAINING AN
OPTION.

The first paper¹ dealt with the existence in England in the eighteenth century of the idea that equity, in order to enforce a contract, required a mutuality of obligation that does not exist in contracts containing an option. The second paper² traced the total disappearance of this idea in England. Cases like *Bromley v. Jefferies*,³ which denied specific performance to the plaintiff, who had given a good consideration for an option to purchase land, are no longer law; *Lawrenson v. Butler*,⁴ in which Lord Redesdale expressed the same idea, is regarded as an overruled case, containing

¹ May number, *supra*, page 270.

² July number, *supra*, page —.

³ 2 Vern. 430, 1700.

⁴ 1 Sch. & Lef. 13, 1802.

obsolete dicta on the Statute of Frauds. In England the defense of lack of mutuality, as a special defence defeating a plaintiff's right to specific performance, is confined to lack of mutuality in the remedy of the parties in equity, and has no longer anything to do with a peculiar lack of mutuality in the obligations in the contract itself. In America, however, the effect of the eighteenth-century idea of the meaning of the defence has had, and, we shall see, is still having, an influence on our decisions.⁵ This is probably due to the fact that leases with options to renew have always been practically unknown in the United States. A lease with an option to purchase is now quite common. In the early part of the nineteenth century, if we can draw a conclusion from the paucity of reported cases, such leases were comparatively rare. Reference to the second paper will show that it was from the lease with an option to renew that we have in England, the modern rule giving specific performance in all cases of contracts containing an option. Thus an important factor there, making towards the abolition of the old idea of lack of mutuality in the obligation as a defence, was wanting, or rather was much less of a force, in the United States.

Another fact tending to perpetuate the old idea of lack of mutuality in this country was the prevalence among the profession, in the first part of the nineteenth century, of two English works, Schoales and Lefroy's Reports, and Newlin on Contracts. The former contained the opinion of Lord Redesdale in *Lawrenson v. Butler*. This opinion, which was examined in the first paper, contained, besides references in the notes to *Bromley v. Jefferies*, and other eighteenth-century cases dealing with lack of mutuality in the obligation as a special defence in equity, this sentence: "I confess I have no conception that a court of equity ought to decree

* *Bromley v. Jefferies* and other eighteenth-century cases cited in the first paper are still used as leading cases on the defence of lack of mutuality: See for example Pomeroy Spec. 8, sec. 163, note 1, ed. of 1897; the American notes to the American edition of Fry on Spec. 8, page 214. The English notes to this work cite *Bromley v. Jefferies*, on page 216, but treat it as a minor case to be referred to under the general statement "see also," the whole note being in support of the assertion that there must be mutuality in the remedy.

a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had, by the agreement, a right to compel a specific performance, because otherwise it would follow that the court would decree a specific performance where the party called upon to perform might be in this situation, *that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance.*"⁶ Though Lord Redesdale was not dealing with contracts containing an option, his words accurately expressed the old idea, which prevented specific performance in such cases. The general use of these reports, and the care with which they were read by such men as Chancellor Kent, as his opinions evidence, would have rendered it more than probable that such a striking sentence would have soon found its way into American opinions. The general use, however, of Newlin on Contracts⁷ seems to have been also an important factor in increasing the references to the decision of *Lawrenson v. Butler*, and the use of the sentence above quoted. For this author devotes several pages to a discussion of the requirement in equity of mutuality in a contract, dealing with practically all the eighteenth-century cases discussed in the first paper, but especially with *Lawrenson v. Butler*, the impression left by the writer being, that it is the principal case.⁸

In tracing the influence of the eighteenth-century idea of lack of mutuality in the obligation on optional cases in this country we shall find that, in practically every case showing of the effect of that influence, the ultimate source of the principles expressed is Lord Redesdale's opinion in *Lawrenson v. Butler*, often directly quoted, or introduced through the medium of the text-book referred to.

Chancellor Kent introduces the idea of lack of mutuality

⁶ Page 28.

⁷ The edition used was that printed by Wm. P. Farrand & Co., Philadelphia, 1808. The book is an English work. The English edition, from which the American was presumably pirated, was issued in 1806, or immediately after the decision by Lord Redesdale and before its repudiation by the English courts.

⁸ American edition, 1808, pages 152 to 156.

in the obligation as a special defence to specific performance in two cases: *Parkhurst v. Van Cortland*⁹ and *Benedict v. Lynch*.¹⁰ The report in both cases is unsatisfactory. In the first case the court seems to have thought that the plaintiff had failed to prove any contract signed by the defendant. Under the Statute of Frauds this failure necessarily defeated the plaintiff. But the chancellor goes on to say: "It is not necessary here to insist on another material defect in the agreement, and that is the want of mutuality, for if the defendant was bound to sell or lease at the option of the plaintiffs, the plaintiffs were not bound to elect or take either . . . and a court of equity will never decree performance where the remedy is not mutual, or only one party is bound by the agreement."¹¹ For this assertion of the necessity for both parties being bound Chancellor Kent cites *Lawrenson v. Butler*, and the eighteenth-century authorities dealing with mutuality.¹²

In the other case, *Benedict v. Lynch*, Chancellor Kent again places his decision on grounds which have nothing to do with lack of mutuality.¹³ He regards the contract sought to be enforced as having been terminated by the parties. But again he speaks of lack of mutuality as a defence, saying: ". . . that a bill for specific performance will not be sustained if the remedy be not mutual, or where one party only is bound by the agreement." As in the former case he uses, in support of this assertion, *Law-*

⁹ 1 Johns. Ch. 273 (N. Y.), 1814.

¹⁰ 1 Johns. Ch. 370 (N. Y.), 1815.

¹¹ Page 282. Note the assertion that the remedy must be mutual, a year before a similar assertion was first made by an English judge, Lord Redesdale. See his opinion in *Hamilton v. Grant*, 3 Dow. 33, 1815, page 42; First Paper, *supra*, page 274. Newlin had assumed in 1806 that mutuality of remedy was necessary. See American ed., 1808, page 157, first paragraph.

¹² The case itself does not stand for a positive decision that a contract containing an option will not be specifically enforced, not only because the decision was expressly placed on other grounds by the court, but because it is doubtful whether the option had any consideration to support it. The option was probably given for a consideration. See the testimony detailed on page 278, indicating that the option was in a lease at will.

¹³ It is also doubtful whether the contract rested on a consideration.

renson v. Butler, together with *Bromley v. Jefferies*, and *Armiger v. Clark*.¹⁴

In the two cases mentioned Chancellor Kent followed Lord Redesdale in applying the principle above expressed, so as to defeat the plaintiff's right to specific performance, where the subject-matter of the contract was land, if the plaintiff had not signed the contract. Subsequently he felt compelled to state that he would follow the English courts, in their repudiation of this idea.¹⁵ There is no reason to believe, however, that Chancellor Kent ever regarded a contract in which the plaintiff held an option as enforceable in equity. *Cleason v. Bailey* only involved the question whether a contract relating to the purchase of goods need, under the Statute of Frauds, be signed by the plaintiff. The admission that he would grant specific performance where the defendant only signed the contract is dictum, and in any event does not throw any light on his opinion in regard to the specific performance of "optional contracts." Yet, in *in re Hunter*,¹⁶ where the plaintiff desired to obtain specific performance of the option to purchase given him in his lease of the defendant's land, the plaintiff's prayer was granted on the theory that the opinion in *Cleason v. Bailey* indicates that the chancellor had changed his mind on this question. A later New York case, *Woodward v. Harris*,¹⁷ refers to the old idea of lack of mutuality, citing *Benedict v. Lynch* as an authority for denying specific performance where the plaintiff had an option.

Boucher v. Vanbuskirk,¹⁸ is the earliest case bearing evidence of the influence of Newlin on Contracts. The plaintiff alleged that he had an option in a lease to buy. He sought a conveyance of the land. Specific performance was denied, the court saying: "that to enable either party to compel specific execution, the contract must be mutually binding on each."¹⁹ This case was not overruled in Ken-

¹⁴ For criticism of this use of *Armiger v. Clark* to support the idea of lack of mutuality as a special defence, see First Paper, *supra*, page 276.

¹⁵ *Cleason v. Bailey*, 14 Johns. 484 (N. Y.), 1817.

¹⁶ 1 Ed. Ch. (N. Y.) 1, 1831.

¹⁷ 2 Barb. 439 (N. Y.), 1848.

¹⁸ 2 A. K. Marsh. 345 (Kty.), 1820.

¹⁹ The citation is Newlin on Contracts, page 154.

tucky until 1888. In that year it was indirectly decided in *Bank of Louisville v. Baumeister*,²⁰ that an option based on a consideration was enforceable. The same principle has since been applied to an option to purchase in a lease.²¹

As early as 1840 it was decided in Maryland, that an option to purchase in a lease could be enforced by the lessee.²² The opinion in a later case, *Geiger v. Green*,²³ introduced the idea that a court will not grant specific performance where the plaintiff holds an option. The case itself should not, on the reported facts, be regarded as having anything to do with the subject, because the option discussed was given without any consideration, and had been withdrawn by the one party before the other elected to take.²⁴ Nevertheless the court treat the original agreement as a contract, and deny specific performance because of the plaintiff's option. They use the language of Lord Redesdale which I have quoted, and cite that case, as well as *Bromley v. Jefferies* and *Boucher v. Vanbuskirk*. In a case arising the next year, *Tyson v. Watts*,²⁵ the court, citing *Geiger v. Green*, again state the

²⁰ 87 Kty. 6.

²¹ *Bacon v. Kentucky Central Railway Company*, 25 S. W. 747 (Kty.), 1894. In this case an attempt is made to show that in *Boucher v. Vanbuskirk* there was no consideration for the option. Whether this is so or not, and from the report of *Boucher v. Vanbuskirk* it is somewhat difficult to decide, the basis of the decision was the optional character of the right to purchase, and the fact that the plaintiff did not prove that he had irrevocably changed his position on the faith of the defendant's promise. Nothing in the report of the opinion in the case is said about any lack of consideration for the option. The recent cases, therefore, repudiate the basis of the decision of the earlier case even if they do not directly overrule it.

²² *Stansbury v. Fringer*, 11 Gill. & John. 149.

²³ 4 Gill. 472, 1846.

²⁴ B. had agreed to allow A. to dig for ore on his, B.'s, land. A. was to pay B. a certain sum per ton as royalty on every ton mined. A. was under no obligation to mine any ore, and he had not given any consideration for the agreement. A. did not signify his intention to dig for ore. B. assigned his rights in the land to C. A. sought an injunction to restrain C. from digging for ore. As the agreement between A. and B. was without consideration, B. could terminate it at any time. His assignment of the land had the same effect as a formal termination of the agreement. There was, therefore, no ground on which A. could restrain C.

²⁵ 1 Md. Ch. 13, 1847.

old idea of lack of mutuality in the words of Lord Redesdale. The case is similar to the one on which the court relied, except that there was a consideration for the option. Reversing, however, their action in the previous case, they make one of the grounds of their decision the failure of the consideration. Therefore, while both cases contain an opinion that the court will not enforce contracts containing an option, neither case can be considered as standing unquestionably for that proposition. The case of *Rider v. Gray*,²⁶ did however directly involve the question. There the plaintiff had given \$10,000 for an option to dig ore on the defendant's land and specific performance was denied. The court do not directly quote from *Lawrenson v. Butler*, but they employ, in dealing with the defence of lack of mutuality, the language of that case, citing *Geiger v. Green*, as if the language had been their original.²⁷ In *Gelston v. Sigmund*,²⁸ the court, this time quoting directly from *Lawrenson v. Butler*,²⁹ go so far as to intimate that an option to renew in a lease will not be enforced. There was, however, in the case before them, too much uncertainty as to the terms of the option, for specific performance to have been granted in any jurisdiction, and in the later case of *Maughlin v. Perry*³⁰ the court reaffirm their first decision in *Stansbury v. Fringer*, and grant specific performance to the holder of such an option. As far as the writer is aware, *Rider v. Gray* has never been reversed. It may, therefore, be presumed that in Maryland the holder of an option in a lease can maintain a bill for specific performance, but that ordinarily holders of options can probably not obtain equitable relief. In other words, that the law in the State is as it was in England in the first part of the eighteenth century.

In Pennsylvania, the case of *Bodine v. Glading*,³¹ introducing the idea of lack of mutuality in the obligation as a defence in specific performance, though the case had nothing

²⁶ 10 Md. 282, 1856.

²⁷ Page 285.

²⁸ 27 Md. 334, 1867.

²⁹ See page 344.

³⁰ 35 Md. 352, 1871.

³¹ 21 Pa. 50, 1853.

to do with the enforcement of contracts containing an option, threw for the time being some doubt on the law of the state relating to that subject. The first Pennsylvania cases dealing with optional contracts had introduced an idea not heretofore met with. *Kerr v. Day*³² was a suit in ejectment against a lessee with an option to purchase by the assignee of the lessor. The question discussed is whether the option gave the lessee an interest in the land, or merely a personal claim against the lessor. The court held that an option in a lease was an interest in the land, thereby reflecting the early English attitude towards options to renew. Two years after this decision, in *Elder v. Robinson*³³ it was held that where a lessor covenanted in a lease, that if he offered the land for sale, the first offer should be made to the lessee, that the lessee acquired "no title or interest in the land." As in *Kerr v. Day*, the question of lack of mutuality was not discussed.³⁴ In the following year *Bodine v. Glading* came before the Supreme Court of the state. As stated, the contract in that case was not a contract containing an option. The facts presented the same point as that adjudicated by Lord Redesdale in *Lawrenson v. Butler*. B. bought A.'s land at auction. The terms of the sale were, that the purchaser should pay within fifteen days, or the land should be resold at the risk of the purchaser. B. refused to take the land or pay the money on account of an alleged defect in the title. As the court regard the objection to the title as untenable, we may regard B. as having broken his contract. A., instead of reselling the land, brought a bill against B. for specific performance. The court affirmed the decree below dismissing the bill, on the ground of lack of mutuality, because the fifteen days having passed, B. had not, under the terms of the agreement, any right to the land. As in the Irish case, owing to his own default the defendant could not have had specific performance; therefore, it is held that the plaintiff, who is not in default, cannot have specific performance, because of lack of mutuality in the obligation. The

³² 14 Pa. 112, 1850.

³³ 19 Pa. 364, 1852.

³⁴ On the idea that these options are interests in the land, compare *Laffen v. Naglee*, 9 Cal. 662, 1858, *contra*.

court use the language of Lord Redesdale, citing that case, and also refer to Newlin on Contracts.³⁵ Though this case introduced considerable confusion into the decisions of the state, under the Statute of Frauds,³⁶ its effect on the question of the enforcement of contracts containing an option was terminated by the case of *Corson v. Mulvany*,³⁷ where, after an elaborate and careful opinion, specific performance was granted to a plaintiff who held an option to purchase land.³⁸ This decision has since been reaffirmed.³⁹

Two other states, Maine and Michigan, show the influence of the old idea of lack of mutuality by casting a doubt on the ability of a court of equity, to enforce contracts containing an option. In *Snell v. Mitchell*,⁴⁰ the plaintiff apparently held an option based on a consideration to purchase a one-half interest in certain land. There are six reasons mentioned by the court for refusing specific performance. One of these is that: "One of the parties could be compelled to sell, but the other could not be compelled to buy." This admission being "sufficient to withhold a decree for specific performance."⁴¹

In Michigan, in the case of *Maynard v. Brown*,⁴² optional contracts are declared to be lacking in mutuality and not enforceable.⁴³ It is doubtful whether the so-called option in the case was given by the defendant for a consideration.

³⁵ See page 53.

³⁶ This subject I hope to take up in a subsequent paper.

³⁷ 49 Pa. 88, 1865.

³⁸ See, however, the language in *Philips v. Mining Co.*, 7 Phila. 619 (Pa. C. C.), 1870.

³⁹ Smith's App., 68 Pa. 474, 1871.

⁴⁰ 65 Me. 48, 1876.

⁴¹ No authorities are cited for the statement. In this case, therefore, we are unable to trace the influence of Lord Redesdale. As far as the writer can ascertain, this is the only reported decision in the state involving options to purchase. There are a number of cases involving specific performance of sales of land where the vendor has given a bond. The bond, however, seems always to contain a recital of a bilateral contract to convey.

⁴² 41 Mich. 298, 1879.

⁴³ The opinion and report are not very satisfactory, the whole case being little over a page long. The counsel for the defendant use the case of *Benedict v. Lynch*.

But from the language used by the court we may conclude that there would appear to be no doubt that they would not enforce a contract containing an option. This conclusion is strengthened by the use made of the case by Judge Cooley in *Rust v. Conard*.⁴⁴ Citing *Maynard v. Brown*,⁴⁵ he says: "If, for example, the contract is so drawn that the vendor has the option to retain the property or to convey it, performance in his behalf will be refused."

The effect of the ideas of the eighteenth century in defeating specific performance of contracts where the plaintiff had an option is limited, as far as the writer is aware, to the jurisdictions discussed, and the cases cited. Though courts have often acknowledged that the subject of mutuality is not clear, the preponderating tendency has been, not to allow the defence to interfere with the enforcement of "optional contracts." Thus, there have been a number of cases in which the lessee has had specific performance of his option to purchase.⁴⁶ Covenants in leases to renew the lease for another term are, as has been stated, rare in this country, but there is no reason to suppose that they would not be

⁴⁴ 47 Mich., page 454. This case involved the question of the right of a plaintiff to specific performance, where, under the terms of the contract, he has, and the defendant has not, the right to terminate the contract. See article in June number on "Two Questions in Specific Performance," *supra*, page 331.

⁴⁵ Page 454.

⁴⁶ *In re Hunter*, 1 Ed. Ch. (N. Y.) 1, 1831; *Stansbury v. Fringer*, 11 Gill. & John. (Md.) 149, 1840; *Kerr v. Day*, 14 Pa. 112, 1850; *Laffen v. Naglee*, 9 Cal. 662, 1858; *D'Arras v. Keyser*, 26 Pa. 249, 1859; *De Rutte v. Mudrow*, 16 Cal. 505, 1860; *Hawrality v. Warren*, 18 N. J. Eq. 124, 1866; *Souffrain v. McDonald*, 27 Ind. 269, 1866; *Kerr v. Purdy*, 50 Barb. 24 (N. Y. S. C.) 1866; *Willard v. Tayloe*, 8 Wal. (U. S.) 557, 1869; *Hall v. Canter*, 40 Cal. 63, 1870; *Napier v. Darlington*, 70 Pa. 64, 1871; *Maughlin v. Perry*, 35 Md. 352, 1871; *Clark v. Clark*, 49 Cal. 586, 1875; *Schroeder v. Germeinder*, 10 Nev. 355, 1875; *Newell's App.*, 100 Pa. 513, 1882; *Herrman v. Babcock*, 103 Ind. 461, 1885; *Page v. Martin*, 46 N. J. Eq. 585, 1890; *House v. Jackson*, 32 Pa. 1027 (Ore.), 1893; *Bacon v. Kty. Cent. Ry. Co.*, 25 S. W. 747 (Kty.), 1894; *Waters v. Bew.*, 29 A. 590 (N. J. Eq.), 1894; *Hayes v. O'Brien*, 149 Ill. 403, 1894; *McCormick v. Stepany*, 41 A. 840 (N. J. Eq.), 1898; *Madison Ath. Asso. v. Brittin*, 46 A. 652 (N. J. Eq.), 1900. To the same effect the language in *McKibbin v. Brown*, 14 N. J. Eq. 13, 1861.

generally enforced.⁴⁷ Perhaps the earliest instance in which a court in the United States gave specific performance where the plaintiff held an option to purchase, which option was not in a lease, is found in the case of *Lanig v. Cole*.⁴⁸ There A., who was in possession of certain land, agreed to let B., a purchaser of the land at sheriff's sale, have possession; B. agreeing to reconvey the land to A., if within six months A. repaid to him the money he had expended. A., through his friends, fulfilled the condition. B. refused to reconvey, and A. brought his bill to compel him to do so. In granting the prayer of the plaintiff the court said: ". . . here was an express condition that the complainant should deliver the possession of the property to the defendant and put him in possession of the rents and profits. This was done . . . and he cannot now say, after a performance by the complainant, that there was no mutuality."⁴⁹ Substantially the same facts appear in another early case, *Western Railroad Corporation v. Babcock*.⁵⁰ Since these decisions, though the question has not arisen in all jurisdictions, there have been a number of similar cases in which specific performance has been granted the holder of similar options.⁵¹ In none of these cases is there any thought of the old idea of lack of mutuality in the obligation as a defence. Thus, in one of the more carefully considered cases, *Corson v. Mulvany*, the Supreme Court of Pennsylvania

⁴⁷ Such a covenant was enforced in a recent case, *Monekon v. Wakelin*, 56 P. 735 (Ariz.), 1890.

⁴⁸ 4 N. J. Eq. 229, 1842.

⁴⁹ Page 232.

⁵⁰ 6 Met. 346 (Mass.), 1843.

⁵¹ *Van Doren v. Robinson*, 16 N. J. Eq. 256, 1863; *Corson v. Mulvany*, 49 Pa. 88, 1865; *Smith's App.*, 69 Pa. 474, 1871; *Estes v. Furlong*, 59 Ill. 298, 1871; *Brown v. Slee*, 103 U. S. 828, 1880; *Waterman v. Waterman*, 27 F. 827, 1886; *Bradford v. Foster*, 87 Tenn. 4, 1888; *Calanchini v. Branstetter*, 84 Cal. 249, 1890; *Ross v. Parks*, 93 Ala. 153, 1890; *Watts v. Kellar*, 56 F. 1, 1893; *Sayward v. Houghton*, 119 Cal. 545, 1898; *Stanton v. Singleton*, 54 P. 587 (Cal.), 1898; *semble Boyd v. Brown*, 34 S. E. 907 (W. Va.), 1899.

discuss, at length, mutuality, but it is mutuality in the remedy, and coming to the conclusion that specific performance can be had by the defendant against the plaintiff the moment the plaintiff elects to take under the option, the court grants the prayer of the plaintiff's bill.⁵²

Before leaving the subject one fact connected with many of the cases I have used should be noted. An examination of the notes will show that they are all cases in which the option sought to be enforced is based on a consideration. As I hope to show in the next paper, an agreement without consideration, in which one party apparently has an option, is often regarded as a continuing offer. This tendency to regard a nude agreement containing an option as an offer has sometimes been carried over to contracts on a good consideration containing an option. Thus, in *Willard v. Tayloe*, where an option to buy was given in a lease, Mr. Justice Field supported the bill on the ground that the option was a continuing offer to sell, "and being made under seal must be regarded as made on sufficient consideration."⁵³ The Supreme Court of Pennsylvania in one case, *Napier v. Darlington*,⁵⁴ also appear to adopt the same idea. Now, in a number of the cases I have cited to support the statement that specific performance will be given to the holder of an option, though the option was in a contract based on a consideration, the plaintiff signified his intention to exercise the option before the contract was repudiated by the defendant. It may be said that, in these cases, the plaintiffs, in making their election, accepted the defendants' continuing offer, and that the contract, which was enforced by the court, was not the contract containing the option, but the contract which began when the plaintiff made his election. It may be admitted that there is some force in the position indicated. In many of the cases I have used, it would have made no difference in the result if the agreement containing the option

⁵² See also *Johnson v. Trippe*, 33 F. 530, 1887.

⁵³ 8 Wall. (U. S.), page 564.

⁵⁴ 70 Pa. 64, 1871.

had been a mere agreement, and not a contract based on a consideration. But in defence of their use to support the general proposition that optional contracts will be enforced, it may be pointed out that in none does the court intimate that, had the defendant attempted to repudiate the contract before the plaintiff elected to exercise his option, that fact would have made any difference in the decision. On the contrary, in those cases where the option is carefully considered there is an express declaration that the court is enforcing the contract entered into at the time the option was given, and not by a fiction, a contract created at the time the plaintiff signified his intention to take.⁵⁵ The criticism suggested, however, does not apply to all the cases cited, as instances in which optional contracts have been enforced. In *Souffrain v. McDonald*,⁵⁶ and *Stanton v. Singleton*,⁵⁷ the defendant had attempted to repudiate the contract before the plaintiff made his election, yet specific performance was granted.⁵⁸ In other cases the defendant is the heir or assignee of the party who gave the option.⁵⁹ A contract relating to land can be assigned, but an offer to sell land is withdrawn by the sale of the land to a third person. The court, therefore, which gave specific performance in the cases cited in the note, could not have done so had they

⁵⁵ See especially *Hawralty v. Warren*, 18 N. J. Eq. 124, 1866, page 129; *Schroeder v. Germeinder*, 10 Nev. 355, 1875, page 364.

⁵⁶ 27 Ind. 269, 1866.

⁵⁷ 54 P. 587 (Cal.), 1898.

⁵⁸ I have placed *Stanton v. Singleton*, *supra*, as an instance of an option in an ordinary contract of sale. In this case the plaintiff agreed to spend \$10,000 in improving certain mining property, and was to have an option for six months to purchase an interest therein for \$500,000. The plaintiff proceeded to develop the property and had expended \$2,000 when the defendant notified him that he repudiated the contract. It may be said, therefore, that there was a lease for six months, with an option to purchase conditioned on the expenditure on the property of \$10,000.

⁵⁹ Kerr, 14 Pa. 112, 1850; *Laffen v. Naglee*, 9 Cal. 662, 1858; *De Rutte v. Mudrow*, 16 Cal. 505, 1860; *Van Doren v. Robinson*, 16 N. J. Eq. 256, 1863; *Calanchini v. Branstetter*, 84 Cal. 249, 1890; *Ross v. Parks*, 93 Ala. 153, 1890; *Hayes v. O'Brien*, 149 Ill. 403, 1894.

regarded the contract containing an option as a mere continuing offer to sell. The same may be said of those cases where specific performance was given, though the plaintiff who made the election was the heir or assignor of the party holding the option. A mere offer cannot be assigned by the offeree.⁶⁰

Thus, we are justified in saying that the old idea of lack of mutuality in the obligation has no longer, except possibly in one or two jurisdictions, any practical effect in preventing a plaintiff, who has held an option, from having specific performance. This does not mean that the effect of the introduction, though Lord Redesdale's opinion in *Lawrenson v. Butler*, of the early English idea of lack of mutuality is dead. "Mutuality in the obligation as well as the remedy" is a phrase too often repeated by the text-book writers and courts, not to tend to have a meaning attached to it. No sooner had it practically ceased to be effective to defeat specific performance in optional contracts, than it was revived to defeat specific performance in cases where the plaintiff holds an option to terminate the contract. As I have discussed at length the cases involving this question in a previous article, I shall here merely refer to some of the conclusions reached.⁶¹

A contract containing an option to terminate is one where one party has the right to consider the contract at an end, thereby terminating his own and the other parties' obligations thereunder. An agreement between A. and B. that B. shall work for A. for a year, in which A. reserves the right to discharge B. at any time, or on notice, after a definite time, is an example of a contract in which A. has an option to terminate. Where one party holds such an option it is impossible for the other to obtain specific performance, for, by the terms of the agreement the defendant could terminate the contract and render the decree of no effect. The cases examined in the article referred to are cases in which the

⁶⁰ The plaintiff was heir or assignor in *Calanchini v. Branstetter*, 84 Cal. 249, 1890; *Sayward v. Houghton*, 119 Cal. 545, 1898.

⁶¹ "Two Questions in Specific Performance," June number, 1901, pages, *supra*, 327 to 335 inclusive.

holder of the option, instead of exercising his right to terminate the contract, desires to go on with it, and, the other party refusing, brings specific performance. The inability of the court to give the defendant specific performance is not due to any infirmity in the court of equity, but to the agreement, which relieves the plaintiff from any obligations. There is no lack of mutuality in the remedy. There is, on the other hand, lack of mutuality in the obligations, though the contract may be good at law. The two leading cases in this country, *Rust v. Conard*,⁶² and *Marble Company v. Ripley*,⁶³ lay emphasis on this lack of mutuality. We have noted the assertion of Judge Cooley, in *Rust v. Conard*, concerning the inability of a court of equity to enforce contracts containing an option.⁶⁴ In *Marble Company v. Ripley*, the court say: "When, from personal incapacity, the nature of the contract or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other."⁶⁵ This sentence is taken from Fry on Specific Performance, section 286. The words "nature of the contract" probably meant to that author a case in which, from the personal nature of the acts to be performed by one party, the Court of Equity cannot give the other specific performance. But in view of the facts of *Marble Company v. Ripley*, the sentence was probably taken by the Supreme Court as an apt way of saying that there must be mutuality in the obligation as well as the remedy.

The difference between the development of the ideas of mutuality as a defence in the United States and England are instructive. In the latter options to renew leases were so common, and the necessity to specifically enforce the cove-

⁶² 47 Mich. 449, 1882.

⁶³ 10 Wall. 339 (U. S.), 1870.

⁶⁴ The argument of counsel in *Rust v. Conard*, is apparently based exclusively on lack of mutuality in the obligation, as the cases cited (see page 450) are *Bromley v. Jefferies*, *Lawrenson v. Butler* and all the American cases expressing a similar idea of the defence which we have just examined. The decision, however, is also based (see page 455) on the fact, that if the plaintiff procured a decree of specific performance he could terminate the contract and thereby nullify the court's action.

⁶⁵ Page 359.

nant of the lessor to renew so strong, that we have the development of an idea of the defence of lack of mutuality, which does not raise any question in regard to contracts containing an option. With us, on the other hand, such leases were practically unknown. Options to purchase in leases, while not rare, were not common, and though in time the apparent justice of granting specific performance to the holder of such an option prevailed over the objection of lack of mutuality, it was only after discussion and argument. In these discussions no one ever doubts that lack of mutuality in the obligation means something in equity more than the mere defence of no contract. Perhaps this is due to the tendency, often observed in the courts of new countries, to presume without question that some book published in the mother-country, or some pre-eminently great judge in their own, correctly expresses the law. Newlin on Contracts and Chancellor Kent said that there must be mutuality in the obligation, therefore every judge who happened to see the expression repeated the phrase. As a result we have a rule of law constantly reiterated which no one quite understands, but which always tends to have some definite meaning. It does not apply to contracts containing an option, but will defeat a plaintiff who holds an option to terminate the contract. In subsequent papers I hope to take up other applications and attempted applications of the defence of lack of mutuality. We will then see that the comparative clearness of modern English decisions and the obscurity which surrounds many of the American cases are due to the fact that in England the defence of lack of mutuality is confined to lack of mutuality in the remedy, while with us there is added to this conception the more or less indefinite idea of lack of mutuality in the obligation. It is first necessary, however, that the subject of the specific performance of optional contracts should be completed. I have purposely excluded from this and the previous paper all cases in which the option is not in an agreement based on a consideration. An agreement which has not a consideration to support it may be a formal contract, that is, an agreement under seal, or it may be without consideration or seal, a mere nude act. Cases

involving options contained in either one of the agreements referred to, and the questions raised by such cases, as far as they relate to the question of specific performance and the defence of lack of mutuality, I hope to take up in the next, or fourth paper.⁶⁶

William Draper Lewis.

⁶⁶ *Note on the Consideration Necessary to Support a Contract Containing an Option.*

What is a sufficient consideration to support a contract containing an option is a question of contracts, not of the specific performance of contracts. No greater consideration should be required to support such a contract which a court is asked to enforce specifically, than any other contract. In the cases to which we are about to refer, the plaintiff held an option; he wanted specific performance of the defendant's promises, and the court discussed the question of consideration.

In *Waterman v. Waterman*, 27 F. 827, 1886, a consideration of one dollar is considered sufficient. See *contra Litz v. Goosling*, 19 S. W. 377 (Kty.), 527, 1892, and *Graybill v. Baugh*, 17 S. E. 558 (Va.), 1893. In this last case the court point out that the one dollar was not paid. See further *Potts v. Whitehead*, 20 N. J. Eq. 55, 1869. The last case, however, does not directly involve the point.

In *Davis v. Petty*, 48 S. W. 944 (Mo.), 1898, there was an agreement to sell one tract of land in which the vendor gave the vendee an option to buy another tract. The option was held to be without consideration. This seems a singular decision.